

SECOND REGULAR SESSION

[CORRECTED]

SENATE BILL NO. 529

97TH GENERAL ASSEMBLY

INTRODUCED BY SENATOR WALLINGFORD.

Pre-filed December 1, 2013, and ordered printed.

TERRY L. SPIELER, Secretary.

4629S.01I

AN ACT

To repeal sections 34.057 and 107.170, RSMo, and to enact in lieu thereof two new sections relating to the payment of public works projects.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Sections 34.057 and 107.170, RSMo, are repealed and two new
2 sections enacted in lieu thereof, to be known as sections 34.057 and 107.170, to
3 read as follows:

34.057. 1. Unless contrary to any federal funding requirements or unless
2 funds from a state grant are not timely received by the contracting public
3 municipality but notwithstanding any other law to the contrary, all public works
4 contracts made and awarded by the appropriate officer, board or agency of the
5 state or of a political subdivision of the state or of any district therein, including
6 any municipality, county and any board referred to as the public owner, for
7 construction, reconstruction or alteration of any public works project, shall
8 provide for prompt payment by the public owner to the contractor, and **any**
9 **professional engineer, architect, landscape architect, or land surveyor,**
10 **as well as** prompt payment by the contractor to the subcontractor and material
11 supplier in accordance with the following:

12 (1) A public owner shall make progress payments to the contractor **and**
13 **any professional engineer, architect, landscape architect, or land**
14 **surveyor** on at least a monthly basis as the work progresses, or, on a lump sum
15 basis according to the terms of the lump sum contract. Except in the case of lump
16 sum contracts, payments shall be based upon estimates prepared at least monthly
17 of work performed and material delivered, as determined by the project architect

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.

18 or engineer. Retainage withheld on **any construction contract or**
19 **subcontract for** public works projects shall not exceed five percent of the value
20 of the contract or subcontract [unless the public owner and the architect or
21 engineer determine that a higher rate of retainage is required to ensure
22 performance of the contract. Retainage, however, shall not exceed ten percent of
23 the value of the contract or subcontract. Except as provided in subsection 4 of
24 this section,]. **If the contractor is not required to obtain a bond under**
25 **section 107.170 because the cost of the public works contract is not**
26 **estimated to exceed fifty thousand dollars, the public owner may**
27 **withhold retainage on the public works project in an amount not to**
28 **exceed ten percent of the value of the contract or subcontract.** The
29 public owner shall pay the contractor the amount due, less a retainage [not to
30 exceed ten percent], within thirty days following the latter of the following:

31 (a) The date of delivery of materials or construction services purchased;

32 (b) The date, as designated by the public owner, upon which the invoice
33 is duly delivered to the person or place designated by the public owner; or

34 (c) In those instances in which the contractor approves the public owner's
35 estimate, the date upon which such notice of approval is duly delivered to the
36 person or place designated by the public owner;

37 (2) Payments shall be considered received within the context of this
38 section when they are duly posted with the United States Postal Service or other
39 agreed upon delivery service or when they are hand-delivered to an authorized
40 person or place as agreed to by the contracting parties;

41 (3) If, in the discretion of the owner and the project architect or engineer
42 and the contractor, it is determined that a subcontractor's performance has been
43 completed and the subcontractor can be released prior to substantial completion
44 of the public works contract without risk to the public owner, the contractor shall
45 request such adjustment in retainage, if any, from the public owner as necessary
46 to enable the contractor to pay the subcontractor in full. The public owner may
47 reduce or eliminate retainage on any contract payment if, in the public owner's
48 opinion, the work is proceeding satisfactorily. If retainage is released and there
49 are any remaining minor items to be completed, an amount equal to [two] **one**
50 **hundred fifty** percent of the value of each item as determined by the public
51 owner's duly authorized [representative] **representatives** shall be withheld
52 until such item or items are completed;

53 (4) The public owner shall pay **at least ninety-eight percent of the**

54 retainage, less any offsets or deductions authorized in the contract or otherwise
55 authorized by law, to the contractor. **The contractor shall pay the**
56 **subcontractor or supplier** after substantial completion of the contract work
57 and acceptance by the public owner's authorized contract representative, or as
58 may otherwise be provided by the contract specifications for state highway, road
59 or bridge projects administered by the state highways and transportation
60 commission. Such payment shall be made within thirty days after acceptance,
61 and the invoice and all other appropriate documentation and certifications in
62 complete and acceptable form are provided, as may be required by the contract
63 documents. **If the public owner or the owner's representative determines**
64 **the work is not substantially completed and accepted, then the owner**
65 **or the owner's representative shall provide a written explanation of**
66 **why the work is not considered substantially completed and accepted**
67 **within fourteen calendar days to the contractor, who shall then provide**
68 **such notice to the subcontractor or suppliers responsible for such**
69 **work. If such written explanation is not given by the public body, the**
70 **public body shall pay at least ninety-eight percent of the retainage**
71 **within thirty calendar days.** If at that time there are any remaining minor
72 items to be completed, an amount equal to [two] **one hundred fifty** percent of the
73 value of each item as determined by the public owner's [representative] **or**
74 **general contractor's representatives** shall be withheld until such items are
75 completed;

76 (5) All estimates or invoices for supplies and services purchased, approved
77 and processed, or final payments, shall be paid promptly and shall be subject to
78 late payment charges provided in this section. Except as provided in subsection
79 4 of this section, if the contractor has not been paid within thirty days as set
80 forth in subdivision (1) of subsection 1 of this section, the contracting agency shall
81 pay the contractor, in addition to the payment due him, interest at the rate of one
82 and one-half percent per month calculated from the expiration of the thirty-day
83 period until fully paid;

84 (6) When a contractor receives any payment, the contractor shall pay each
85 subcontractor and material supplier in proportion to the work completed by each
86 subcontractor and material supplier his application less any retention not to
87 exceed [ten] **five** percent. If the contractor receives less than the full payment
88 due under the public construction contract, the contractor shall be obligated to
89 disburse on a pro rata basis those funds received, with the contractor,

90 subcontractors and material suppliers each receiving a prorated portion based on
91 the amount of payment. When, however, the public owner does not release the
92 full payment due under the contract because there are specific areas of work or
93 materials he is rejecting or because he has otherwise determined such areas are
94 not suitable for payment then those specific subcontractors or suppliers involved
95 shall not be paid for that portion of the work rejected or deemed not suitable for
96 payment; **provided the public owner or the owner's representative gives**
97 **a written explanation to the contractor, subcontractor, or supplier**
98 **involved as to why the work or supplies were rejected or deemed not**
99 **suitable for payment,** and all other subcontractors and suppliers shall be paid
100 in full;

101 (7) If the contractor, without reasonable cause, fails to make any payment
102 to his subcontractors and material suppliers within fifteen days after receipt of
103 payment under the public construction contract, the contractor shall pay to his
104 subcontractors and material suppliers, in addition to the payment due them,
105 interest in the amount of one and one-half percent per month, calculated from the
106 expiration of the fifteen-day period until fully paid. This subdivision shall also
107 apply to any payments made by subcontractors and material suppliers to their
108 subcontractors and material suppliers and to all payments made to lower tier
109 subcontractors and material suppliers throughout the contracting chain;

110 (8) The public owner shall make final payment of all moneys owed to the
111 contractor, **including any retainage withheld under subdivision (4) of this**
112 **subsection,** less any offsets or deductions authorized in the contract or otherwise
113 authorized by law, within thirty days of the due date. Final payment shall be
114 considered due upon the earliest of the following events:

115 (a) Completion of the project and filing with the owner of all required
116 documentation and certifications, in complete and acceptable form, in accordance
117 with the terms and conditions of the contract;

118 (b) The project is certified by the architect or engineer authorized to make
119 such certification on behalf of the owner as having been completed, including the
120 filing of all documentation and certifications required by the contract, in complete
121 and acceptable form; or

122 (c) The project is certified by the contracting authority as having been
123 completed, including the filing of all documentation and certifications required
124 by the contract, in complete and acceptable form.

125 2. Nothing in this section shall prevent the contractor or subcontractor,

126 at the time of application or certification to the public owner or contractor, from
127 withholding such applications or certifications to the owner or contractor for
128 payment to the subcontractor or material supplier. Amounts intended to be
129 withheld shall not be included in such applications or certifications to the public
130 owner or contractor. Reasons for withholding such applications or certifications
131 shall include, but not be limited to, the following: unsatisfactory job progress;
132 defective construction work or material not remedied; disputed work; failure to
133 comply with other material provisions of the contract; third party claims filed or
134 reasonable evidence that a claim will be filed; failure of the subcontractor to make
135 timely payments for labor, equipment and materials; damage to a contractor or
136 another subcontractor or material supplier; reasonable evidence that the contract
137 can not be completed for the unpaid balance of the subcontract sum or a
138 reasonable amount for retention, not to exceed the initial percentage retained by
139 the owner.

140 3. Should the contractor determine, after application or certification has
141 been made and after payment has been received from the public owner, or after
142 payment has been received by a contractor based upon the public owner's
143 estimate of materials in place and work performed as provided by contract, that
144 all or a portion of the moneys needs to be withheld from a specific subcontractor
145 or material supplier for any of the reasons enumerated in this section, and such
146 moneys are withheld from such subcontractor or material supplier, then such
147 undistributed amounts shall be specifically identified in writing and deducted
148 from the next application or certification made to the public owner or from the
149 next estimate by the public owner of payment due the contractor, until a
150 resolution of the matter has been achieved. Disputes shall be resolved in
151 accordance with the terms of the contract documents. Upon such resolution the
152 amounts withheld by the contractor from the subcontractor or material supplier
153 shall be included in the next application or certification made to the public owner
154 or the next estimate by the public owner and shall be paid promptly in accordance
155 with the provisions of this section. This subsection shall also apply to
156 applications or certifications made by subcontractors or material suppliers to the
157 contractor and throughout the various tiers of the contracting chain.

158 4. The contracts which provide for payments to the contractor based upon
159 the public owner's estimate of materials in place and work performed rather than
160 applications or certifications submitted by the contractor, the public owner shall
161 pay the contractor within thirty days following the date upon which the estimate

162 is required by contract to be completed by the public owner, the amount due less
163 a retainage not to exceed five percent. All such estimates by the public owner
164 shall be paid promptly and shall be subject to late payment charges as provided
165 in this subsection. After the thirtieth day following the date upon which the
166 estimate is required by contract to be completed by the public owner, the
167 contracting agency shall pay the contractor, in addition to the payment due him,
168 interest at a rate of one and one-half percent per month calculated from the
169 expiration of the thirty-day period until fully paid.

170 **5. The public owner shall pay or cause to be paid to any**
171 **professional engineer, architect, landscape architect, or land surveyor**
172 **the amount due within thirty days following the receipt of an invoice**
173 **prepared and submitted in accordance with the contract terms. In**
174 **addition to the payment due, the contracting agency shall pay interest**
175 **at the rate of one and one-half percent per month calculated from the**
176 **expiration of the thirty-day period until fully paid.**

177 **6.** Nothing in this section shall prevent the owner from withholding
178 payment or final payment from the contractor, or a subcontractor or material
179 supplier. Reasons for withholding payment or final payment shall include, but
180 not be limited to, the following: liquidated damages; unsatisfactory job progress;
181 defective construction work or material not remedied; disputed work; failure to
182 comply with any material provision of the contract; third party claims filed or
183 reasonable evidence that a claim will be filed; failure to make timely payments
184 for labor, equipment or materials; damage to a contractor, subcontractor or
185 material supplier; reasonable evidence that a subcontractor or material supplier
186 cannot be fully compensated under its contract with the contractor for the unpaid
187 balance of the contract sum; or citation by the enforcing authority for acts of the
188 contractor or subcontractor which do not comply with any material provision of
189 the contract and which result in a violation of any federal, state or local law,
190 regulation or ordinance applicable to that project causing additional costs or
191 damages to the owner.

192 **7. Nothing in this section shall be construed to require direct**
193 **payment by a public owner to a subcontractor or supplier, except in the**
194 **case of the default, as determined by a court, of the contractor on the**
195 **contract with the public owner where no performance or payment bond**
196 **is required or where the surety fails to execute its duties, as**
197 **determined by a court.**

198 [6.] 8. Notwithstanding any other provisions in this section to the
199 contrary, no late payment interest shall be due and owing for payments which are
200 withheld in good faith for reasonable cause pursuant to subsections 2 and 5 of
201 this section. If it is determined by a court of competent jurisdiction that a
202 payment which was withheld pursuant to subsections 2 and 5 of this section was
203 not withheld in good faith for reasonable cause, the court may impose interest at
204 the rate of one and one-half percent per month calculated from the date of the
205 invoice and may, in its discretion, award reasonable attorney fees to the
206 prevailing party. In any civil action or part of a civil action brought pursuant to
207 this section, if a court determines after a hearing for such purpose that the cause
208 was initiated, or a defense was asserted, or a motion was filed, or any proceeding
209 therein was done frivolously and in bad faith, the court shall require the party
210 who initiated such cause, asserted such defense, filed such motion, or caused such
211 proceeding to be had to pay the other party named in such action the amount of
212 the costs attributable thereto and reasonable expenses incurred by such party,
213 including reasonable attorney fees.

107.170. 1. As used in this section, the following terms mean:

2 (1) "Contractor", a person or business entity who provides construction
3 services under contract to a public entity. Contractor specifically does not include
4 professional engineers, architects or land surveyors licensed pursuant to chapter
5 327, those who provide environmental assessment services or those who design,
6 create or otherwise provide works of art under a city's formally established
7 program for the acquisition and installation of works of art and other aesthetic
8 adornments to public buildings and property;

9 (2) "Public entity", any official, board, commission or agency of this state
10 or any county, city, town, township, school, road district or other political
11 subdivision of this state;

12 (3) "Public works", the erection, construction, alteration, repair or
13 improvement of any building, road, street, public utility or other public facility
14 owned by the public entity.

15 2. It is hereby made the duty of all public entities in this state, in making
16 contracts for public works, the cost of which is estimated to exceed [twenty-five]
17 **fifty** thousand dollars, to be performed for the public entity, to require every
18 contractor for such work to furnish to the public entity, a bond with good and
19 sufficient sureties, in an amount fixed by the public entity, and such bond, among
20 other conditions, shall be conditioned for the payment of any and all materials,

21 incorporated, consumed or used in connection with the construction of such work,
22 and all insurance premiums, both for compensation, and for all other kinds of
23 insurance, said work, and for all labor performed in such work whether by
24 subcontractor or otherwise.

25 3. All bonds executed and furnished under the provisions of this section
26 shall be deemed to contain the requirements and conditions as herein set out,
27 regardless of whether the same be set forth in said bond, or of any terms or
28 provisions of said bond to the contrary notwithstanding.

29 4. Nothing in this section shall be construed to require a member of the
30 school board of any public school district of this state to independently confirm
31 the existence or solvency of any bonding company if a contractor represents to the
32 member that the bonding company is solvent and that the representations made
33 in the purported bond are true and correct. This subsection shall not relieve from
34 any liability any school board member who has any actual knowledge of the
35 insolvency of any bonding company, or any school board member who does not act
36 in good faith in complying with the provisions of subsection 2 of this section.

37 5. A public entity may defend, save harmless and indemnify any of its
38 officers and employees, whether elective or appointive, against any claim or
39 demand, whether groundless or otherwise arising out of an alleged act or
40 omission occurring in the performance of a duty under this section. The
41 provisions of this subsection do not apply in case of malfeasance in office or
42 willful or wanton neglect of duty.

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